

## ESG at the SEC: Hints of More to Come

The SEC's Acting Chair, Commissioner Allison Herren Lee, was a vocal critic of the SEC's approach to environmental, social and governance ("ESG") matters under former Chair Jay Clayton. She voted against the SEC's 2020 [guidance](#) and [amendments](#) to Regulation S-K because they did not go far enough in requiring disclosure from public companies about climate change and diversity metrics, [noting](#) that climate risk is a new type of systemic risk of "colossal and potentially irreversible risk of staggering complexity" and [arguing](#) that "it's time to consider how to get investors the diversity information they need to allocate their capital wisely." "Consistent, reliable, and comparable disclosures of the risks and opportunities related to sustainability measures, particularly climate risk," [she said](#), is material information that investors need in their decision-making process. The Statement on the Review of Climate-Related Disclosure from Commissioner Lee and the ESG Funds Investor Bulletin from the SEC's Office of Investor Education and Advocacy released last week were thus not surprising. They were also likely only the first in a series of ESG-related actions to come from the SEC.

## Review of Compliance with Prior Interpretive Guidance

In her February 24, 2021, [Statement on the Review of Climate-Related Disclosure](#), Commissioner Lee announced that the Division of Corporation Finance would review public company filings for compliance with SEC's [2010 interpretive guidance](#) regarding disclosure related to climate change. That guidance [highlighted](#) areas where climate change could trigger materiality-based disclosure requirements for public companies, including with respect to the impact on the company of: domestic and/or international regulatory developments related to climate change; legal, technological, political and scientific developments regarding climate change; and physical, environmental matters. The staff will also "engage with public companies on these issues and absorb critical lessons on how the market is currently managing climate-related risks" and begin updating the 2010 guidance to reflect developments over the past decade. These, Commissioner Lee said, are "immediate steps the agency can take on the path to developing a more comprehensive framework that produces consistent, comparable, and reliable climate-related disclosures."

## Investor Bulletin on ESG Funds

The ESG Funds Investor Bulletin (the "[Bulletin](#)") also focuses on the lack of standardized ESG data regarding public companies in the U.S. as well as the non-standardized ESG practices among asset managers. The Bulletin educates mutual fund and ETF investors about ESG investing and explains, among other things, that:

- What counts as "ESG" may be subjective and may be defined in significantly different ways by different funds or sponsors. Funds may also weight ESG factors differently or focus on different specific criteria within a factor.
- Some funds that don't have "ESG" in their name may still incorporate elements of ESG investing into their portfolios.
- Investors should review a fund's disclosure documents to understand how the fund incorporates and weights ESG principles in its portfolio and should consider where the fund manager sources its ESG data (internally or from a third party) and what methodology the manager uses to compare portfolio companies.

- Because some funds may focus on ESG investing, while others consider ESG factors alongside other more traditional factors, it's important to determine whether ESG is a core component of the stock selection process.
- Investors should consider whether the fund employs an ESG practice of importance to the investor, such as voting proxies in a certain manner or engaging with issuers to influence their ESG practices.

## More to Come?

Commissioner Lee is the SEC's Acting Chair as Gary Gensler, whom President Biden has named as SEC Chair, awaits confirmation. Additional ESG-related announcements from the SEC in the short term could, among other things, address:

- the ESG-related questions in the SEC's March 2020 [request for comment](#) on the fund "names rule" ([Rule 35d-1](#) under the Investment Company Act of 1940);
- the September 2020 [shareholder proposal rule amendments](#) ([Rule 14a-8](#) under the Securities Exchange Act of 1934); and
- the late 2020 preliminary recommendations of the SEC Asset Management Advisory Committee's [ESG Sub-Committee](#) and/or [Diversity & Inclusion Sub-Committee](#); and/or Commissioner Lee's November 2020 [suggestion](#) that the SEC consider "rules that would require advisers to maintain and implement policies and procedures governing their approach to ESG investment."

Please continue to monitor this blog for further developments regarding these issues.

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